

Office Supreme Court, U. S.

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No. 1031370 JAMES D. WAHER,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1918

J. HARTLEY MANNERS

Petitioner

v.

OLIVER MOROSCO

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CHARLES H. TUTTLE

WILLIAM KLEIN

Counsel for Respondent

IN THE

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OCTOBER TERM, 1918.

J. HARTLEY MANNERS,
Petitioner,

against

OLIVER MOROSCO,
Respondent.

BRIEF FOR RESPONDENT.

The petitioner seeks a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit to review the affirmance of a decree dismissing on the merits a bill of complaint in an equity action. The trial was in the District Court for the Southern District of New York before Judge Mayer, whose opinion appears at page 147 of the Record.

The bill of complaint purports to set forth two causes of action:

First, for threatened infringement of the plaintiff's copyright in the play "Peg o' My Heart," obtained in July, 1918. The bill charges that the defendant intends to give motion picture representations of the play (fol. 6-36).

Second, for a threatened unauthorized use of the play, both on the stage and in motion picture form (fols. 36-93).

The relief demanded is that the defendant be restrained—

(1) From playing, producing or controlling in any manner "Peg o' My Heart;" and

(2) From manufacturing and presenting any motion picture based upon "Peg o' My Heart" (fol. 94-100).

Notwithstanding the extraordinary extent of the complaint and the array of subsidiary charges which it marshalls, the plaintiff's claims have, upon the trial and the brief, boiled down to the interpretation of the two contracts: the one dated January 1, 1912 (fol. 38), and the other dated July 20, 1914, modifying the former (fol. 55).

The only claims which the petitioner presses as reasons for allowing this extraordinary writ are, in substance:

(1) That the grant of the right "to produce, perform and represent" the play did not carry with it the right of production and representation in motion picture form.

(2) That the defendant's rights under these contracts terminated automatically with the period of dramatic seasons specified in paragraph Third of the earlier contract (fol. 43).

In the foregoing statement we have emphasized the existence of the contract of July 20, 1914 (Rec. p. 117-121), which radically modifies the contract of January 19, 1912, because the petition and the

brief in support thereof proceed as if the contract before the Court were solely the earlier contract of January 19, 1912. That contract alone is printed as an appendix to the petition, and in the appendix to the brief that contract is the one from which the excerpts are made, and which is printed under the title "Contract under Discussion." Indeed, the later contract of July 20, 1914, is referred to only at one place in the petition and brief, *i. e.* on page 2; and its mention there is most casual, and is expressed as if the only effect of the later contract were to release Miss Taylor from being required to appear in the principal role, and to permit the defendant to produce the play with more than one company. On the contrary, this later agreement covers the whole field of the relationship between the plaintiff and the defendant, and accomplishes modifications far more important to this controversy than the two mentioned in the petitioner's printed book.

POINT I.

The exercise of the exceptional power to issue a writ of certiorari is without precedent in such a case as this. The case involves merely the interpretation of special clauses in a private contract, not at all likely to be reproduced and presenting no question of general interest. So far as general principles are involved, they are well settled.

In *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S., 251, this Court said concerning the nature of its jurisdiction to review by certiorari (p. 258):

"As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner*, 141 U. S., 583, 587; *In re Woods*, 143 U. S., 202; *Lau Ow Beu v. United States*, 144 U. S., 47, 58; *Amer. Const. Co. v. Jacksonville Ry.*, 148 U. S., 372, 382; *Forsyth v. Hammond*, 166 U. S., 506, 514; *Fields v. United States*, 205 U. S., 292, 296."

In the present case, nothing is involved except a unique private contract, which three judges have interpreted one way, and one, another.

(1) It is a mistake to say that "the decisions of the state and federal courts are conflicting." The nearest approach to the present contract in the reported cases is the contract construed in *Frohman v. Fitch* (164 App. Div., N. Y., 231). There the Appellate Division of the Supreme Court of the State of New York held, precisely as did United States Circuit Court of Appeals in the present case, that the motion picture rights were included in the broad grant of the producing rights. The case of *Klein v. Beach* (239 Fed., 109, 232 Fed., 240) is not in conflict with the *Frohman* case, and the opinion therein expressly so declares (239 Fed., 108, 109).

"The plaintiff insists, in view of *Kalem Co. v. Harper* (222 U. S., 55) and *Frohman v. Fitch* (164 App. Div., 232), that dramatic rights include motion picture rights. If used alone, that is doubtless true."

So, likewise, in the *Klein* case Judge Mayer (who was the trial judge in that and the present cases and whose decisions have in each case been

affirmed by the Circuit Court of Appeals), held that his opinion was in no way in conflict with *Frohman* case and said (232 Fed., 240, 246) :

"In *Frohman v. Fitch* (164 App. Div., 232), Fitch, who had agreed to write and deliver a play, had sold his original work to Frohman under a broad grant which clearly comprehended the ownership of Fitch's work by Frohman for all purposes."

The reason why the result reached in the *Frohman* case was not reached in the *Klein* case, is carefully pointed out in the opinion of Circuit Court of Appeals in the *Klein* case (p. 109); and is that the grant in the *Klein* case was solely of the right to dramatize the book "for presentation on the stage.". Since the preambles expressly drew a distinction between "the dramatic rights" as a whole and the narrower right to produce "for presentation on the stage," the limitation of the granting clause to the narrower right, was construed as confining the grantee to representation on the stage as distinct from representation on the screen. In the present case, however, the reverse is the fact, and no distinction is made between the producing rights which the plaintiff had and those which he conveyed, except in the single particular which the parties themselves were careful to define, to wit, the right reserved to the plaintiff to publish the play in book form under certain conditions designed to prevent competition between the book and the dramatic representation (fol. 48).

The obvious reconciliation between the *Klein* case and the *Frohman* case is thus pointed out

in the opinion of the Circuit Court of Appeals in the present case (Rec., p. 164):

"Appellant, however, says that *Klein v. Beach* (239 Fed. Rep., 108) supports his views. In that case, it was recited, 'Whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage' and the novelist granted to the author 'the sole and exclusive right to dramatize the said book for presentation on the stage,' and the parties agreed to grant to the manager 'the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage,' the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering *Klein v. Beach*, *supra*, said: 'The turning point in this case is the scope of the grant whether by its terms it conferred upon *Klein* the dramatic rights in the larger sense including presentation not only by living actors, but also by motion pictures or whether it was limited to the stage proper.' This court approved *Frohman v. Fitch*, *supra*, and upon the authority of *Kalem v. Harper* (222 U. S., 55) stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations. In *Klein v. Beach*, *supra*, stagerights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: 'In general it is quite clear that this was the prevailing purpose of the parties.'"

(2) Nor is there any conflict in the present case between decisions "of federal courts of different circuits." Both the *Klein* case and the present case

were decided by the same Circuit Court of Appeals. Judge Mayer who sat as trial judge in both cases has said (Rec., p. 156):

"The question in *Klein v. Fitch*, *supra*, was whether the additional words 'have presented on the stage' and 'on the stage,' construed with their context, meant the spoken play."

In distinguishing the *Klein* case, the Circuit Court of Appeals in the present case says (Rec., p. 165):

"In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph Tenth, to wit, reserving the right to publish the play in book form under the conditions there expressed."

(3) Consequently, the present case does not fall within any of the narrow categories where the exceptional power to issue a writ of certiorari is exercised.

No one disputes the general principles which are involved, to wit, that a general grant of the dramatic rights carries the motion picture rights, and that where the parties themselves have undertaken to define what rights are reserved other reservations will not easily be implied. The only issue is as to the application of these general principles to the special contract here involved. The suit is a peculiarly private controversy involving a peculiarly private and special issue.

POINT II.

There has been no diversity whatsoever as to the decision of this Court in *Kalem v. Harper* (222 U. S., 55), and that decision, so far from aiding the petitioner, works directly against him.

(1) The petitioner's memorandum says (p. 12):

"There is, apparently, much diversity of opinion as to its meaning. This is well illustrated in the opinions of the two courts which heard the present case. Judge Mayer, in the District Court said, with respect to the word 'produce': 'When used alone that word has a definite meaning by virtue of *Kalem v. Harper*.' The meaning of the word 'produce' is not even referred to in the *Kalem* decision."

This seems to us to put an unwarranted twist upon a single sentence in the opinion of Judge Mayer, where the word "produce" was obviously used as a brief synonym for the words to "produce perform and represent," which the learned Judge in the immediately preceding sentence had just quoted from the granting clause in the present contract (Rec. p. 156). The fact is that the opinion of this Court in the *Kalem* case is taken up with the construction of two of these very words, *i. e.*, "perform" and "represent," as used in the copyright law. That we are right in this is shown by the following quotation from the brief of Mr. David Gerber (one of the counsel for this plaintiff) in the case of *Frohman v. Fitch* (164 App. Div., 231), where he was supporting the opposite of his pres-

ent contention, and where he desired to repel an attempt to distinguish the *Kalem* case (p. 9):

"The Court in that case [the *Kalem* case] construed the words '*performance*' and '*representation*' of a drama in the statute, while this Court has before it the same question on the construction of the same words in the contract."

Indeed, Judge Mayer's reference to the meaning of a grant of the producing rights, if it stands alone, was taken almost bodily from the opinion of the Circuit Court of Appeals in the *Klein* case, on which the petitioner now so much relies. In that opinion it is said (p. 109):

"The plaintiff insists, in view of *Kalem Co. v. Harper* (222 U. S., 55) and *Frohman v. Fitch* (164 App. Div., 232) that dramatic rights include motion picture rights. If used alone that is doubtless true."

(2) By way of further effort to sustain the thesis of a diversity of opinion as regards the *Kalem* decision, the petitioner's memorandum says (p. 13):

"The Circuit Court of Appeals, in its opinion also referred to the *Kalem* case as having been its authority in a previous case (*Klein v. Beach, supra*) for holding that the grant of a license of dramatic rights, if narrowed by other limitations, did not include motion pictures, while, in the present case, directly the opposite is held."

Neither of these statements is correct. What the Circuit Court of Appeals in the present case really said concerning these two decisions was this (Rec., p. 165):

"This Court [in the *Klein* case] approved *Frohman v. Fitch*, *supra*, and upon the authority of *Kalem v. Harper* (222 U. S., 55), stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations."

Obviously, this is a correct exposition of the holdings in both the *Klein* and *Kalem* cases, for unquestionably the *Kalem* case did hold that, generally speaking, dramatic rights included motion picture rights, and the *Klein* case quite correctly so interpreted the *Kalem* case; but, on the other hand, the *Kalem* case does not hold that a grant of the dramatic rights would include the motion picture rights, notwithstanding other limitations showing a contrary intention, as was the fact in the *Klein* case, where the grant expressly was confined to stage rights.

It approaches the absurd to say that, in the present case, the Circuit Court of Appeals held that a grant of dramatic rights "if narrowed by other limitations" would, nevertheless, necessarily include motion picture rights. All that the court held was that there were here no limitations which excluded the motion picture rights, but that, on the contrary, when the parties did undertake themselves to define what rights were excluded from the grant, they expressly limited them as follows (Rec. on Appeal, p. 149):

"Tenth.—The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained."

(3) The petitioner's memorandum further says (p. 13):

"The difficulty is that the courts apply the *Kalem* decision to matters quite beyond its scope. They treat a decision construing the copyright law as if it interpreted a contract."

The answer to this proposition is that given by the learned counsel himself, in his brief in the *Frohman* case, when on the opposite side of his present proposition (p. 9):

"The Court in that case [the *Kalem* case] construed the words 'performance' and 'representation' as used in the statute, while this Court has before it the same question on the construction of the same words in a contract. Plaintiff acquired in this case by contract precisely what Klaw and Erlanger secured under the statute in the case cited, by arrangement with the author and owners of the copyright of Ben Hur."

POINT III.

The contract between the parties clearly conferred upon the defendant, as part of the production rights, the right to produce the play in motion picture form.

The granting clause of the contract of January 19, 1912, was, by its very terms, absolute and inclusive of all producing rights: (a) because it conveyed all the producing rights without exception; and (b) because it recited that the rights conveyed were "exclusive of all other producing rights."

The word "represent" is peculiarly appropriate to a motion picture representation of a play. Ordi-

narly, one may "produce" or "perform" a spoken play upon the stage, but one does not necessarily speak of "representing" such a play, whereas it is a common expression to speak of "representing" a play in motion pictures.

Like the granting clause, the two recitals (fol. 42) make plain the purpose of the agreement to place the plaintiff in the position of author and the defendant of producer, and to give the latter the sole right of placing the play before the American public in each and every form which constitutes its production or representation.

The certainty that the parties had no intent to make any reservation not expressed is heightened by the fact that in Paragraph Tenth of the contract (fol. 48) they reserved to the plaintiff the right to print and publish the play in book form, but only on such conditions as would prevent competition between the grantor's book rights and the grantee's production rights. This reservation is doubly significant. In the first place, the parties therein directed their attention to a definition of the rights of representation reserved to the plaintiff, and confined those rights to mere publication in book form. In the second place, the defendant was so solicitous that there should be no competition between representation by him and representation by the plaintiff, that even this right of publication was to cease upon production of the play in New York. It is absurd to suppose that the parties intended that this plaintiff, who was thus prevented even from publishing the play in book form during its New York run, could have produced it in New York in motion picture theatres for five and ten cents admission, while the

defendant was trying to make a success of it in the same city at two dollars a seat (fols. 219, 220).

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage. The plaintiff drove the unusually favorable bargain of reserving ten per cent. of the gross (not net) receipts, and thus stood to win even if the defendant lost money; but such terms implied that the plaintiff conveyed rights which inherently contained the promise and possibility of profits to the defendant, and made no reservations, mental or otherwise, which would enable the plaintiff at will to render the contract unprofitable to the defendant, or to take for himself the benefit of any popularity which the defendant should build up for the play by the investment of his time, reputation and money.

The supplemental contract of July 20, 1914, further illustrates the intent of the parties to transfer to the defendant the ownership of the play for all production purposes. It removes the prohibitions in the original agreement upon the defendant's leasing, subletting, assigning or selling (fol. 70); removes the requirement as to Laurette Taylor being in the title role; and allows the defendant to employ as many companies as he might see fit—the paragraph expressly stipulating that the defendant "is hereby given sole and exclusive charge and control" (fol. 66).

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the motion picture rights were included.

Lipzin v. Gordin, 166 N. Y. Suppl., 792;
Hart v. Fox, 166 N. Y. Suppl., 793;
Photo-Drama Motion Picture Co. v. Social
Uplift Corp., 220 Fed., 448, 458;
Kalem v. Harper Bros., 222 U. S., 55, 61;
Universal Film M. Co. v. Copperman, 218
 Fed., 577, 581;
Liebler & Co. v. Bobbs-Merrill Co., 162
 App. Div., 900;
Drone on Copyright, p. 588;
Brackett's Theatrical Law, p. 61.

The claim that there is some repugnancy between the provisions for royalties and a production in motion picture form is unwarranted. Such production has its gross weekly receipts, precisely as does the spoken production. If the defendant produced on the screen he could quite as easily pay a percentage of his gross weekly receipts to the plaintiff as if he produced on the stage; and if he availed himself of his right under the modifying contract to let out such right of production, the plaintiff's right to the stipulated royalties (it was expressly agreed) would not be affected thereby (fol. 64).

Nothing in the provision in Paragraph Seventh forbidding alterations, eliminations or additions to be made in the play without the approval of the author, prevents the operations of the granting clause as a grant of all production rights, including motion pictures. As pointed out by Judge Mayer, any such contention is "not persuasive in view of the *Kalem* and *Frohman v. Fitch* cases" (fol. 473); for, if a motion picture representation is something different as a dramatization from the play itself, then the Court, in the *Kalem* case,

should have held that there was no infringement, and the court in the *Frohman* case should have held that the motion picture rights were not included in the grant of the production rights of the play. Under Paragraph Seventh no alterations are to be made "in the play," as distinct from various methods of presenting the play to the public. Would the appellant claim that, because of this clause, the defendant could not have presented the play in pantomime by living actors upon the stage, or with the aid of a mirror? Yet these are the very tests which, in the *Kalem* case (221 U. S., 55, 61), this Court laid down for determining whether a motion picture presentation would be an infringement of the copyright of the play. In other words, Paragraph Seventh is a guarantee that the public are to see "the event or story lived" precisely as the plaintiff composed it, whether the presentation be by word of mouth, pantomime, reflection in a mirror, moving picture, or any other medium.

POINT IV.

The court below did not hold that the rights granted were in perpetuity. It merely held that they were not limited to the period of seasons specified in Paragraph Third of the original contract.

The Court below very correctly held that the rights conveyed were not a mere license in any technical, legal sense. To quote the opinion (Rec., p. 161):

"It [the contract] was not an agreement for personal service or for a mere license, but was

a bargain and sale of the sole and exclusive right to produce, perform and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value, and is the subject of proprietorship. It is not a conveyance which is revocable at will or for a temporary period, but for the time provided for in the terms of the contract, * * *. An agreement for production rights binding the parties, heirs, executors, assignees, administrators and successors, is an assignment, and not a mere license (*Photodrama Motion Picture Co. v. Film Corp.*, 213 Fed., 374; *aff'd* 220 Fed., 448).

In *Frohman v. Fitch*, 164 App. Div. (N. Y.), 231, 233, it was said of the grantee's rights under a similar contract:

"The contract, as we have seen, gave to the plaintiff the 'exclusive right to produce or to have produced the said play in the United States of America and in Canada.' This exclusive right was to protect the plaintiff in the property which he had purchased. That the plaintiff's rights under the contract constituted property cannot be questioned."

The argument that what was given was merely a revocable personal license and not a right, is totally unwarranted. By its very terms, it was a "right," as indicated in the second recital of the original agreement, expressing the wish of the defendant "to obtain the exclusive *right* and *license* to produce, perform and represent the said play." Moreover, the contract provides that if the play be not produced for the stipulated number of performances, then "all *rights*" of the defendant shall cease and

determine (fol. 45); and forbids any assignment by the defendant of "any of his aforesaid *rights* in and to the dramatic composition or play" without the plaintiff's consent (fol. 49). The modifying agreement, in its turn, provides that the defendant may lease, sublet, assign or sell "any of his *rights* acquired under the said original agreement or this supplemental agreement" (fols. 63-4).

Nor was the so-called license merely personal, for rights which may be leased, sublet, assigned, transferred or sold, singly or collectively, to any person, firm or corporation (fol. 63), and which bind not only the parties, but also their "heirs, executors, assigns, administrators and successors" (fol. 50), are in no sense merely personal.

Nor is the so-called license necessarily revocable (quite irrespective of the other provisions of the contracts), for, since it was bought and paid for and coupled with a continuing interest upon a continuing consideration connected with the enjoyment of the rights acquired, it was not revocable.

Paragraph Third of the original contract, upon which the petitioner so much relies, was not a grant by the plaintiff, but a covenant by the defendant. As well said by the court below, "it was a statement of the least that the defendant was to do, not of the most that he was to have." The object of the paragraph was to assure to plaintiff a *bona fide* and consistent attempt on the part of the defendant to make the play successful, and thus to furnish the plaintiff with substantial royalties.

The limitation of time expressed in Paragraph Fifth of the contract (fol. 45), excludes the implication of any other limitation of time. This paragraph provides that upon the defendant's

failure to present the play for seventy-five performances in any one theatrical year, then all rights of the defendant shall immediately revert to the plaintiff.

The entire harmony of Paragraphs First, Third and Fifth, and the purpose of the parties that the defendant's rights should not be limited to any fixed period of time, are further emphasized by the provisions of Paragraphs Eleventh and Twelfth, that should the play fail in New York City and on the road it might thereupon be "released for stock" and the royalties be equally divided (fol. 49). Paragraph Twelfth is elucidated in the modifying agreement of July 20, 1914, as follows (fol. 65):

"Twelfth.—Said play, 'Peg o' My Heart,' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand dollars (\$2,000)."

As the Court knows, and as the evidence makes plain, "stock" theatres are not "first-class theatres," and thus are not within the class of theatres wherein, by Paragraph Sixth, the defendant agreed to produce the play as long as its success continued (fols. 214-7). Paragraphs Eleventh and Twelfth, therefore, are proof that the parties contemplated production through the defendant after the period mentioned in Paragraph Third; and they mean, when read with Paragraphs Third and Fifth, that if the production of the play for the specified number of performances

in any one season is unprofitable, then it may be produced in stock theatres.

Paragraph Third is a guarantee by the defendant that he will produce for the specified number of seasons seventy-five performances a year in first-class theatres; and for the breach of that agreement, he would be liable in damages. Paragraph Fifth, on the other hand, while it supplies the cumulative remedy of forfeiture throughout the period covered by this guarantee, continues to be operative after that period has expired. In other words, the defendant was willing to assume a personal obligation for the fixed period specified in Paragraph Third, but intended afterwards to be merely under the penalty of forfeiture, which penalty was itself mitigated by the provision of Paragraphs Eleventh and Twelfth, that if the failure to produce the requisite number of performances in any one year was due to realizing a profit of less than \$2,000, the play could be released for stock, in which event the royalties would be divided equally, thus furnishing to both parties a measure of protection against loss.

Furthermore, the modifying contract constituted a plain recognition by both parties that the original contract was not limited to the period mentioned in Paragraph Third; and that the only question which was to be considered open after July 20, 1918, was whether that contract carried the motion picture rights. Paragraph Ninth of the modifying contract (fol. 66), is a complete demonstration that the parties regarded the production rights as continuing beyond 1918, and merely debated whether the motion picture rights were included among them.

Any construction of the contract as modified whereby it would be limited to the period of seasons mentioned in Paragraph Third of the original contract would be harsh and oppressive of the defendant. The bargain which the plaintiff drove not only threw upon the defendant the entire cost of producing the play and placing it before the public, but also the entire burden of such losses as might occur; while at the same time it compelled the defendant to pay heavy royalties—not out of the net profits—but out of the gross weekly receipts, according to a sliding scale ranging from five to ten per cent. The plaintiff now has the hardihood to claim that, in addition, this contract which thus assured him of substantial returns even though the defendant might lose money, also gave him the right to deprive the defendant of both the play and the rewards of hard-won success while such success was at its very zenith, and to take over and exploit for himself alone the entire investment which the defendant had made of his time, money and professional reputation.

POINT V.

The appendix attached to the petitioner's brief is not fair.

At page 15 of this brief, counsel say:

"For the convenience of the Court, we have in the appendix prepared a parallel column of the essential paragraphs of the contract in the *Klein-Beach* case and the one under discussion."

In our judgment, this appendix, which consists merely of counsel's own paraphrasing of selected paragraphs, omits many of the essential elements in both contracts. For example, it omits the preambles which were a determining point in the *Klein* case; and it omits the preamble in the present contract, which are the very opposite of those in the *Klein* case. It omits all of the provisions of Paragraph Tenth of the present contract (fol. 48), wherein the parties themselves expressly undertake to define what rights were reserved to the plaintiff. It recites as a term of the present contract, that the defendant shall not lease, sublet, etc., his rights; whereas the contract of July, 1914, provided for exactly the opposite (fol. 63). It omits Paragraph Ninth of the contract of 1914, which shows that the parties contemplated that the producing rights would extend beyond the period mentioned in Paragraph Third of the original contract. It omits the provision of the original contract that it shall be binding upon the heirs, executors, assigns, administrators and successors of both parties (fol. 50),—a clause absolutely negating the plaintiff's fundamental claim that what was given was merely a personal license. It inserts

the provisions of the original contract contemplating the appearance of Miss Taylor in the title role, and omits the provisions of the contract of 1914, striking out this restriction.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated, New York, May 29, 1919.

Respectfully submitted,

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